Masco Contractor Services East, Inc., a/k/a Cary Corporation d/b/a Cary Insulation of New Jersey *and* New Jersey Regional Council of Carpenters of the United Brotherhood of Carpenters and Joiners of America. Cases 4–CA–32261 and 4–CA–32526

January 31, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On April 16, 2004, Administrative Law Judge William G. Kocol issued the attached decision. The General Counsel and the Charging Party each filed exceptions and a supporting brief. The Respondent filed cross-exceptions and a supporting brief. All parties filed answering briefs, and the Charging Party and the Respondent filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted, and the complaint is dismissed.

[1] The General Counsel and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In adopting the judge's conclusion that the complaint is time-barred under Sec. 10(b) of the Act, we rely on the admissions in union representative Ronald Kraus' credited testimony that he knew no later than December 2002, both that the parties had entered into the February 2000 short-form agreement and that the Respondent was not complying with the terms of this collective-bargaining agreement "in any manner." Further, we rely on the credited testimony showing that Kraus and other union officials knew even before December 2002 that the Respondent was holding itself out as a nonunion company, and that, in dealings with the Respondent, the Union treated it as such. This evidence establishes that the Union had clear and unequivocal notice, outside the 6-month limitations period, that the Respondent had totally repudiated the short-form agreement and not merely breached the contract's provisions, as the General Counsel and the Union contend. *A & L Underground*, 302 NLRB 467, 469 (1991).

In light of our disposition of this case, we need not pass on the Respondent's cross-exceptions.

Dated, Washington, D.C. January 31, 2006

Robert J. Battista, Chairman

Peter C. Schaumber, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Andrew S. Brenner, Esq., for the General Counsel.
James W. Wimberly Jr. and *James L. Hughes, Esqs. (Wimberly, Lawson, Steckel, Nelson & Schneider, PC)*, of Atlanta, Georgia, for the Respondent.
Howard Simonoff, Esq. (Jennings Sigmond) of Cherry Hill, New Jersey, for the Union.

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on January 20–23, 2004. The charges and amended charge were filed by the New Jersey Regional Council of Carpenters of the United Brotherhood of Carpenters and Joiners of America (the Union) on July 1, September 29, and October 24, 2003.[1] The order consolidating cases, consolidated complaint, and notice of hearing (the complaint) issued on December 3. The complaint alleges that Masco Contractors Services East, Inc., a/k/a Cary Corporation d/b/a Cary Insulation of New Jersey (Respondent)[2] signed a short-form agreement on February 29, 2000, that bound it to other agreements and that since about February 2003; Respondent ceased abiding by the agreements. The complaint also alleges that Respondent failed to supply the Union with certain information. Respondent filed a timely answer that denied the substantive allegations of the complaint and raised a number of affirmative defenses, the most significant of which is that Section 10(b) of the Act bars the complaint allegations. In my view the critical issue in this case is whether the Union knew more than 6 months before it filed the first charge that Respondent was not adhering to the contract.

After the hearing closed in this case the General Counsel filed a motion to correct transcript. In that motion the General Counsel states that a stipulation "was mistakenly not transcribed as part of the record in this case." The motion is unclear whether this mistake was made by the court reporter or whether the General Counsel mistakenly forgot to offer the stipulation. Respondent filed an opposition. Among other things, Respondent contends that it did not agree to the stipulation or that any such stipulation was made on or off the record.

[1] All dates are in 2003 unless otherwise indicated.

[2] Respondent's correct legal name is Masco Contractor Services East, Inc. d/b/a Cary Insulation of New Jersey.

Because the General Counsel has failed to show that the alleged stipulation was omitted from the record as a result of a transcription error, I deny the motion.[3]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Union, and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material Respondent, a corporation was engaged in the installation of insulation and had a branch office in Jackson, New Jersey. During the past calendar year Respondent performed services valued in excess of $50,000 outside the State of New Jersey. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. I also conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Masco Contractor Services East, Inc. (Masco East) owns and operates about eight branches in New Jersey including Respondent. It also has about 120 branches outside New Jersey. Respondent's facility is located in Jackson, New Jersey. The other branches are not respondents in this proceeding. Masco East is a division of Masco Contractor Services. Masco Corporation in turn owns Masco Contractor Services. Masco East was formerly known as Cary Corporation; its name was changed in late 2001.

As indicated, Respondent installs insulation. It performs primarily residential work. Bruce Anez is director of human resources for Masco East. Richard Doyle is Respondent's branch manager at the facility located in Jackson, New Jersey. Normally Doyle only signs service contracts and cannot obligate Respondent to contracts requiring Respondent to spend over $1000. As branch manager, Doyle has the authority to hire, fire, and discipline employees at the branch; he also grants overtime. He assigns employees to jobs and transfers employees from one job to another. Indeed, at the hearing Respondent admitted that Doyle was a supervisor within the meaning of Section 2(11) and an agent within the meaning of Section 2(13). At times material to this case Respondent employed about 45 persons there about 40 of whom installed insulation.

On February 29, 2000, Doyle also signed a short-form agreement (SFA) with the Union. He credibly testified, however, that he did not recall the circumstances under which he signed the agreement. No copy of the agreement was found at the facility. The Union and the General Counsel did not identify or call as a witness the union representative who might have presented Doyle with the SFA. Nor did they otherwise explain the circumstances surrounding the signing of that agreement. Respondent did not receive any additional information from the Union concerning the SFA that Doyle signed, such as copies of the actual collective-bargaining agreements, an explanation of wage and benefit rates, or forms to be used in making contributions to benefit funds.[4] At no time since Doyle signed the agreement has Respondent applied it in any manner.

Over the years, even before Doyle signed the SFA, Respondent and the Union had a practice whereby the Union allowed Respondent to work on certain union jobs.[5] When working on the union jobs Respondent made payments to the Union's welfare funds for the employees who worked there. Several of Respondent's employees were union members and Respondent assigned those employees to the union projects. On those occasions Respondent also paid the employees working there the union wage rates. Otherwise, Respondent did not pay its employees those rates or benefits. When working on these union jobs the Union generally would also supply one union member from its hiring hall for each employee that Respondent used on the project. Respondent also paid these employees the contractual pay rates and benefits. In 2000, records indicate that Respondent reported that in 5 weeks during the year from one to up to five employees worked on union jobsites. In 2001, Respondent made payments in about 18 weeks covering from one to three employees during those weeks. The General Counsel contends that since Doyle signed the SFA Respondent made contributions to the funds for 28 different union members at 20 different projects. But to put this in perspective, Respondent's sales range between $6 and $7 million. The union jobs described above amounted to only about 1–2 percent of Respondent's business.

At all times material the Union understood that Respondent was nonunion and was not adhering to any collective-bargaining agreement. Roland Kraus is the Union's organizer and council representative. Kraus admitted that throughout 2002, he knew that Respondent was not complying with any collective-bargaining agreement. He also admitted seeing on December 18, 2002, a copy of the agreement signed by Doyle and knowing at that time that Respondent had not been adhering to that agreement. Other evidence supports these admissions. For example, in the spring of 2001, the Union met with Patrick McNeil, a sales representative for Respondent. Union officials attempted to persuade McNeil that Respondent should sign a collective-bargaining agreement and become a union business. McNeil declined to do so.[6] During mid 2001 and late 2003, Alfred Shaffer, then owner of Shaffer Services, Inc., had conversations with Kraus during which Kraus indicated that Respondent and other components of Masco East were nonunion. In addition, during a conversation in about February 2002, Kraus indicated that the Union was doing the best it could to persuade Respondent to sign a collective-bargaining agreement. Shaffer sometimes complained to Kraus when Respondent performed work on a union jobsite. He pointed out that Respondent was nonunion while his business was union and that he should be performing that work. Kraus acknowledged that Respondent was nonunion. On those occasions Respondent

[3] General Counsel also filed a second motion to correct transcript. That unopposed motion is granted.

[4] I do not credit the uncertain and ambiguous testimony to the contrary.

[5] This conclusion is based on the credible testimony of McNeil and Anez.

[6] These facts are based on McNeil's credible testimony.

was then removed from the jobsite.[7] Frank Spencer, the Union's executive director, explained that the Union has about 9000–10,000 agreements in the area and that therefore it is difficult to police those agreements.

In March the Union filed a grievance. On March 21, the parties met to discuss the matter. However, at the start of the meeting Respondent provided the Union with a letter in which Respondent claimed it was unaware of any contract and denied it had any contractual obligations with the Union. Respondent indicated in the letter that it would be meeting with the Union to discuss the basis of the Union's claim that such a contractual obligation existed. At the meeting the Union presented Respondent with certain documents to support its assertions, including a copy of the SFA signed by Doyle. On March 26, the Union sent Respondent additional documents showing that Respondent had made payments on behalf of its employees to the Union's benefit funds. In addition the Union requested information from Respondent. The failure to provide that information is a matter covered by the allegations in the complaint. Respondent replied by letter dated April 18. It reiterated that it had met with the Union in a spirit of cooperation in order to hear the Union's concerns. The parties met again on May 14 where they agreed to hold the grievances in abeyance. On July 2, the Union requested that Respondent supply it with additional information.

The Act requires that charges must be filed within 6 months after a party has clear and unequivocal notice that the Act has been violated. See, e.g., *Leach Corp*., 312 NLRB 990, 991 (1993), enfd. 54 F.3d 802 (D.C. Cir. 1995). In this situation it is Respondent who bears the burden of proving the 10(b) defense. Id. As indicated above the initial charge in this case was filed July 1 and served July 2. So the operative date for 10(b) purposes is January 2. I have concluded that Doyle signed the SFA in February 2000. I have also concluded above that at all times since then Respondent has failed to apply any of the terms of that agreement and the Union was aware that Respondent was nonunion and was not adhering to any collective-bargaining agreement.

In his brief the General Counsel argues, "the Regional Council had no reason to know that Respondent was flouting its contractual obligations. . . . Moreover, the Regional Council had reason to believe that Respondent was complying with the agreement but only had sporadic and occasional work in the Regional Council's jurisdiction." I conclude that the record does not support such an inference. As described above, the credible evidence establishes that the practice whereby Respondent performed "sporadic and occasional" union work was in place well before Doyle signed the SFA and that practice was unrelated to Doyle's signing the SFA. Rather, I have concluded above as a matter of fact that the Union treated Respondent as a nonunion business that was not abiding by any collective-bargaining agreement. The General Counsel relies on *Neosho Construction Co.*, 305 NLRB 100 (1991). In that case the employer signed a short-form agreement in 1975. In 1990, a business representative observed the employer's employees on a jobsite and discovered the 1975 agreement. The judge in that case concluded the union was not aware of the fact that the employer had not been complying with the agreement and found a violation of the Act, and the Board affirmed. I find that that case is distinguishable. It is true that the mere fact that an employer had failed to apply the terms of a contract for many years may be insufficient, standing alone, to conclude that a charge filed after those years is untimely under Section 10(b). In this case however I am not relying on the passage of time alone. Rather I have concluded that the Union knew during all those years that Respondent was not complying with any contract.

In its brief the Union argues:

> What is critical is to identify the specific unfair labor practice at issue. The Union's claim is not that the Employer failed to abide by the terms of a collective bargaining agreement, but that Respondent repudiated an existing 8(f) agreement. Thus, the evidence is unequivocal that it was not until the second step grievance meeting on March 21, 2003, that the Union was informed . . . that the Respondent was no longer bound by its contract with the Union.

In support of this argument the Union cites *A & L Underground*, 302 NLRB 467 (1991). In that case the Board dismissed a complaint after it concluded that the Union had notice that the employer had repudiated a contract more than 6 months before the union filed a charge. Remember that I have concluded above that Respondent's occasional work on union projects was not pursuant to any collective-bargaining agreement but was done pursuant to an arrangement with the Union that preceded the contract at issue in this case. As a consequence, under *A & L Underground* the Union failed to timely file its charge.

In its brief the Union attempts to address Kraus's testimony by characterizing it as "his personal and subjective views regarding Respondent's non-union proclivities." But the facts remain that Respondent never implemented the terms of the SFA that Doyle signed and Kraus knew that throughout this period Respondent was operating as a nonunion employer. The Union attempts to explain this fact away because "It is undisputed that until December 18, 2002, Kraus was not even aware that the Respondent was under contract with the Union. . . ." However, the Union's failure to communicate this fact to Kraus does not excuse it from following the requirements of Section 10(b). In support of this argument the Union cites *Cowboy Scaffolding, Inc.*, 326 NLRB 1050 (1998). In that case the Board dealt with statements by supervisors of a respondent that incorrectly indicated that there was no contract with the union involved there. Here, however, Kraus made statement correctly indicating that he knew that Respondent was not adhering to any union contract.

Finally, citing *CAB Associates*, 340 NLRB 536 (2003), the Union argues that it was Respondent's ambiguous conduct of occasionally working on union jobs that caused the Union to delay filing a charge in this matter. I reject that argument because the Union knowingly participated in the practice of allowing Respondent to work on union jobs so long as Respondent paid the contractual wage rates and benefits for those jobs

[7] These facts are based on Shaffer's credible testimony.

while at the same time knowing that Respondent did not adhere to any contract in the vast majority of its other work.

Under these circumstances I conclude that Section 10(b) of the Act in this case bars the complaint allegations concerning Respondent's alleged obligations to recognize the Union. It follows that Respondent had no obligation to provide the Union with information.

CONCLUSION OF LAW

The Union did not file its charge within the period specified in Section 10(b) of the Act and Respondent did not violate the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. April 16, 2004

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.